MILLENNIUM MEDICARE SERVICES v. NAGADEVAN MAHALINGAM

COURT OF APPEAL, PUTRAJAYA
LINTON ALBERT JCA
MOHD ZAWAWI SALLEH JCA
UMI KALTHUM ABDUL MAJID JCA
[CIVIL APPEAL NO: J-02-2627-11-2012]
18 DECEMBER 2015

CONTRACT: *Restraint of trade – Agreement – Clauses in partnership agreement – Restrictive covenants – Medical practitioners – Defendant prohibited from setting up same nature of business within 15 kilometres radius of plaintiff's branches – Whether clause in partnership agreement contravened s. 28 Contracts Act 1950 – Whether void and unenforceable – Whether clause falls under exception 2 of s. 28 Contracts Act 1950 – Dissolution of partnership – Whether agreement made upon or in anticipation of dissolution of partnership – Whether there was specific clause dealing with dissolution of partnership – Whether claim sustainable*

The appellant ('plaintiff') was running a business of health care centres ('the said business') with the principal place of business at Bandar Baru Permas Jaya, Johor. The plaintiff was also running the said business at the branches of Taman Johor Jaya, Ulu Tiram and Jalan Mawar. The respondent ('defendant') was a registered medical practitioner. The defendant had agreed to join the plaintiff as a partner *vide* an agreement dated 1 November 2006 ('the said agreement'). The partnership was deemed to have commenced on 1 November 2006 pursuant to cl. 2(i) of the said agreement. Under cl. 11(iii) of the said agreement, it was an express term that the defendant as a partner should not practise as a medical practitioner by setting up any medical practice by himself or as a partner or as an employee within the radius of 15km from any of the plaintiff's branches within three years after the defendant had ceased to be a partner of the plaintiff. Subsequently, in accordance with cl. 2 (ii) of the said agreement, the defendant had given three months notice to resign and withdraw as a partner of the plaintiff with effect from 5 May 2007 *vide* letter dated 5 February 2007. As of April 2007, the defendant practised as a medical practitioner at a clinic which was within the radius of 15km from one of the plaintiff's branches. In consequence, the plaintiff sought from the High Court, *inter alia*, for an injunction to restrain the defendant from practising within 15km radius from the plaintiff's branches, and for damages. The High Court Judge dismissed the plaintiff's application on the grounds, amongst others, that: (i) exception 2 to s. 28 of the Contracts Act 1950 ('CA') was meant to cover two situations, *ie* (a) upon the dissolution of a partnership; and (b) in anticipation of a dissolution of a partnership; and (ii) cl. 2(ii) of the said agreement only governed the termination of the partnership agreement between the plaintiff and the

defendant but not the dissolution of the partnership. Hence, the present appeal. The issues that arose for determination was whether the High Court Judge erred in law and in fact in holding that exception 2 of s. 28 of the CA did not apply to the present case.

Held (dismissing appeal with costs)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) Section 28 of the CA is general in its terms and unequivocally declares all agreements in restraint of trade void *pro tanto*, except in the cases specified in the exceptions. Section 28 of the CA was enacted at a time when trade was undeveloped and the object underlying the section was to protect the trade from restraints. Until such time as it is otherwise provided (including any amendment to the section by Parliament), the court must give effect to the existing s. 28. (paras 19-21)

(2) The issue whether the said agreement was made upon or in anticipation of the dissolution of partnership is a question of fact which must be pleaded. The plaintiff had ample opportunity to include in its pleading material facts and circumstances which supported its claim that the said agreement was entered into in anticipation of the partnership practice being dissolved but nevertheless failed to do so. Therefore, the parties were bound by their pleadings and the court was precluded from deciding on a matter that the parties themselves have decided not to put into issues. (paras 26 & 27)

(3) The plaintiff had failed on the balance of probabilities to prove its assertion that the said agreement was entered into in anticipation of the partnership practice being dissolved. Therefore, exception 2 to s. 28 of the CA clearly did not apply in this instant appeal. The conclusion of the trial judge was supported by evidence and did not suffer from any infirmity warranting intervention from the present court. (paras 28 & 29)

(4) The trial judge relied, amongst others, on the evidence that (i) the said agreement did not contain a specific clause which dealt with the dissolution of the partnership practice; (ii) cl. 2(ii) of the said agreement only governed the termination of the partnership agreement between the plaintiff and the defendant but not the dissolution of the partnership to come to the conclusion as he did. (para 29)

(5) There was no evidence to show that the partnership agreement was made in anticipation of the dissolution of the partnership practice then or in the near future. Further, no such inference could be drawn from the facts adduced that the parties expected that the dissolution of the partnership would probably happen and they had prepared for it at the time of the execution of the partnership agreement. (para 30)

***Bahasa Malaysia** Headnotes*

Perayu ('plaintif') telah menjalankan perniagaan penjagaan kesihatan ('perniagaan tersebut') dengan cawangan utama perniagaannya bertempat di Bandar Baru Permas Jaya, Johor. Plaintif turut menjalankan perniagaan tersebut di cawangan-cawangan di Taman Johor Jaya, Ulu Tiram dan Jalan Mawar. Responden ('defendan') merupakan seorang pengamal perubatan berdaftar. Defendan telah bersetuju untuk menyertai plaintif sebagai rakan kongsi melalui satu perjanjian bertarikh 1 November 2006 ('perjanjian tersebut'). Perkongsian tersebut dianggap sebagai telah bermula pada 1 November 2006 di bawah kl. 2(i) perjanjian tersebut. Di bawah kl. 11(iii) perjanjian tersebut, terdapat terma nyata bahawa defendan sebagai rakan kongsi, tidak dibenarkan menjalankan amalan perubatan dengan menubuhkan apa-apa amalan perubatan dengan sendiri atau sebagai rakan kongsi atau sebagai pekerja dalam lingkungan 15km dari mana-mana cawangan plaintif selama tempoh tiga tahun selepas defendan berhenti menjadi rakan kongsi plaintif. Selepas itu, berdasarkan kl. 2(ii) perjanjian tersebut, defendan telah memberikan notis selama tiga bulan untuk meletakkan jawatannya dan menarik diri sebagai rakan kongsi plaintif berkuat kuasa dari 5 Mei 2007 melalui surat bertarikh 5 Februari 2007. Mulai April 2007, defendan telah menjalankan amalan sebagai pengamal perubatan di sebuah klinik yang berada dalam lingkungan 15km dari salah satu cawangan plaintif. Oleh yang demikian, plaintif telah memohon daripada Mahkamah Tinggi, antara lain, untuk mendapatkan injunksi bagi menghalang defendan dari mengamal dalam radius 15km dari cawangan plaintif dan untuk ganti rugi. Hakim Mahkamah Tinggi telah menolak permohonan plaintif atas alasan, antara lain, bahawa: (i) pengecualian 2 kepada s. 28 Akta Kontrak 1950 ('AK') bertujuan untuk merangkumi dua keadaan, iaitu (a) semasa pembubaran perkongsian; dan (b) atas jangkaan pembubaran perkongsian; dan (ii) kl. 2(ii) perjanjian tersebut hanya tertakluk kepada penamatan perjanjian perkongsian di antara perayu dan responden tetapi tidak tertakluk kepada pembubaran perkongsian. Oleh itu, rayuan ini. Isu-isu yang dibangkitkan untuk pertimbangan mahkamah adalah sama ada Hakim Mahkamah Tinggi terkhilaf dari segi undang-undang dan fakta dalam memutuskan bahawa pengecualian 2 kepada s. 28 AK tidak terpakai dalam kes ini.

Diputuskan (menolak rayuan dengan kos)

Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 28 AK adalah umum dalam terma-termanya dan jelas memperuntukkan kesemua perjanjian yang menyekat perniagaan void *pro tanto*, kecuali dalam keadaan yang dinyatakan dalam pengecualian. Seksyen 28 AK telah digubal ketika perdagangan belum lagi maju dan

objek yang mendasari seksyen ini adalah untuk melindungi perdagangan dari sekatan. Sehinggalah suatu masa peruntukan sebaliknya dibuat (termasuk apa-apa pindaan kepada seksyen tersebut oleh Parlimen), mahkamah perlu menguatkuasakan s. 28 yang sedia ada.

(2) Isu sama ada perjanjian tersebut telah dibuat semasa atau dalam jangkaan pembubaran perkongsian adalah persoalan fakta yang harus diplidkan. Plaintif mempunyai peluang yang mencukupi untuk memasukkan ke dalam plidingnya fakta material dan hal keadaan yang menyokong tuntutannya bahawa perjanjian tersebut telah dimeterai dalam jangkaan bahawa amalan perkongsian tersebut akan dibubarkan namun gagal berbuat demikian. Oleh itu, pihak-pihak terikat dengan pliding mereka dan mahkamah dihalang daripada membuat dapatan mengenai sesuatu perkara di mana pihak-pihak sendiri telah memutuskan untuk tidak membangkitkan isu-isu itu.

(3) Plaintif gagal atas imbangan kebarangkalian untuk membuktikan dakwaannya bahawa perjanjian tersebut telah dibuat dalam jangkaan amalan perkongsian tersebut akan dibubarkan. Oleh itu, pengecualian 2 kepada s. 28 AK jelas tidak terpakai dalam rayuan ini. Kesimpulan hakim bicara disokong oleh keterangan dan tidak mengalami sebarang kelemahan yang mewajarkan campur tangan mahkamah ini.

(4) Hakim bicara bergantung, antara lain, kepada keterangan bahawa (i) perjanjian tersebut tidak mengandungi klausa spesifik yang berurusan dengan pembubaran amalan perkongsian; (ii) kl. 2(ii) perjanjian tersebut hanya merangkumi penamatan perjanjian perkongsian di antara plaintif dan defendan tetapi bukan pembubaran perkongsian untuk membuat kesimpulan seperti yang dilakukannya.

(5) Tiada keterangan yang menunjukkan bahawa perjanjian perkongsian tersebut telah dibuat dengan jangkaan berlaku pembubaran perkongsian pada masa itu atau pada masa terdekat. Begitu juga tiada sebarang inferens yang boleh dibuat daripada fakta-fakta yang dikemukakan bahawa pihak-pihak menjangkakan bahawa pembubaran perkongsian tersebut mungkin akan berlaku dan mereka telah bersedia untuk pembubaran tersebut semasa melaksanakan perjanjian perkongsian.

Case(s) referred to:

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Deacon's (a firm) v. Bridge [1984] 2 All ER 19 ***(refd)***

Eng Thye Plantation Bhd v. Lim Heng Hock & Ors [2001] 4 CLJ 245 CA ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC ***(refd)***

Nagadevan Mahalingam v. Millennium Medicare Services [2011] 3 CLJ 529 CA ***(refd)***

Percept D'Mark (India) Pvt Ltd v. Zaheer Khan & Anor AIR [2006] SCC 227 ***(refd)***

Vision Cast Sdn Bhd & Anor v. Dynacast (Melaka) Sdn Bhd & Ors [2014] 8 CLJ 884 CA ***(refd)***
Wipro Ltd v. Beckman Coulter International SA, 2006 (3) ARBLR 118 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 2, 28

Contract Act 1872 [Ind], s. 27

For the appellant - Wong Kim Fatt; (KS Pang, Wong Boon Chong with him); M/s KS Pang & Co
For the respondent - Mohd Faizal Ahmad; M/s Hazelin & Assocs

[Editor's note: For the High Court judgment, please see Millenium Medicare Services v. Nagadevan Mahalingam [2013] 9 CLJ 766 (affirmed).]

Reported by Sandra Gabriel

JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

[1] This appeal stems from the decision of the Johor Bahru High Court dismissing the appellant's claim against the respondent with costs of RM8,000.

[2] The appellant is claiming against the respondent for:

(a) a permanent injunction to restrain the respondent from practising as a medical practitioner as a sole proprietor or partner or employee within the 15km radius from the appellant's following branches:

  (i) No. 63, Jalan Permas 10/11, Bandar Baru Permas Jaya, 81750 Masai, Johor;

  (ii) No. 97, Jalan Bakawali 50, Taman Johor Jaya, 81100 Johor Bahru, Johor;

  (iii) No. 16, Jalan Johar 3, Taman Desa Cemerlang, 81800 Ulu Tiram, Johor; and

  (iv) No. 19, Jalan Mawar, 81750 Masai, Johor,

(b) damages to be assessed;

(c) costs to be taxed and to be paid forthwith; and

(d) any other relief this Honourable Court deems fit and proper.

[3] The appellant had obtained an *inter partes* interim injunction against the respondent on 17 September 2007 to restrain the respondent from practising as a medical practitioner as a sole proprietor or a partner or an employee within the radius of 15km from the appellant's branches stated

above until 4 May 2010. Since the date of trial was fixed after 4 February 2010 before the High Court, therefore, the prayer for permanent injunction was irrelevant and the relevant relief was the damages.

[4] For convenience, we will refer to the parties by their designations at the trial: the appellant as the plaintiff and the defendant as the respondent.

Facts Of The Case

[5] The facts giving rise to this appeal have been succinctly and correctly narrated by the learned trial judge in his grounds of judgment to which both parties agree. To save judicial time, we reproduce the same hereunder:

(a) The plaintiff is at all material times a partnership running the business of Health Care Centre with the principal place of business at No. 63, Jalan Permas 10/1, Bandar Baru Permas Jaya, 81750 Masai, Johor. The plaintiff is also running the said business at the branches of the following address:

(i) No. 97, Jalan Kawali 50, Taman Johor Jaya, 81100 Johor Bahru, Johor;

(ii) No. 16, Jalan Johar 3, Taman Desa Cemerlang, 81800 Ulu Tiram, Johor; and

(iii) No. 19, Jalan Mawar, 81750 Masai, Johor.

(b) The defendant at all material times is a registered medical practitioner, *to wit*, a medical doctor residing at No. 73, Jalan Perwira 7, Taman Ungku Tun Aminah, 81300 Skudai, Johor.

(c) By the agreement dated 1 November 2006 (the said agreement) entered into between the plaintiff and the defendant, the defendant had agreed to join the plaintiff as a partner commencing on 1 November 2006 for two years from the said date subject to the terms of the said agreement.

(d) Under cl. 2(i) of the agreement, the partnership shall be deemed to have commenced on 1 November 2006. It is an express term of the said agreement that the defendant as a partner shall not practise as a medical practitioner by setting up any medical practice himself or as a partner or as an employee within the radius of 15km from any of the plaintiff's branches stated above within three years after the defendant has ceased to be a partner of the plaintiff.

(e) Clause 11(iii) of the said agreement states that:

> No partner shall without the written consent of the Managing Partner:
>
> (iii) set up any medical practice within three (3) years after ceasing to be partner within a radius of 15km from any partnership clinics as medical practitioner either by himself or as a partner or employee of any person or company.

(f) By the letter dated 5 February 2007 (P5), the defendant had given three months notice to resign and withdraw as a partner of the plaintiff with effect on 5 May 2007 under cl. 2(ii) of the said agreement which reads as follows:

> The working partnership shall be extended on a yearly basis from the date of expiry. Either the managing partner or Dr Nagadevan may terminate the partnership by giving three (3) months notice in advance to the other. If no notice of termination was given by either of them three (3) months prior to the expiry of the partnership then in such event the parties have agreed or deemed to have agreed to continue the partnership on a yearly basis period from the date of expiry subject to the same terms and conditions.

(g) The defendant had stopped working or had been absent from his duty since early of April, 2007 and he had practised as a medical practitioner at Klinik Medic Care at No. 30, Jalan Johar 3/2, Taman Desa Cemerlang, 81800 Ulu Tiram, Johor within the radius of 15km from one of the plaintiff's branches at No. 16, Jalan Johar 3, Taman Desa Cemerlang, 81800 Ulu Tiram, Johor. This is shown in the letter dated 6 November 2007 from the Kementerian Kesihatan Malaysia (P6).

The Issues

[6] The same issues of law and fact that were canvassed in the court below were reiterated before us, namely:

(a) whether the instant case falls under exception 2 of s. 28 of the Contracts Act 1950; and

(b) whether the plaintiff is entitled to damages.

The Decision Of The Trial Judge

[7] The approach and reasoning of the trial judge in dismissing the plaintiff's claim may be summarised as follows:

(a) Exception 2 to s. 28 of the Contracts Act 1950 is meant to cover two situations, that is: (i) upon the dissolution of a partnership; and (ii) in anticipation of a dissolution of a partnership;

(b) Clause 2(ii) of the said agreement only governs the termination of the partnership agreement between the plaintiff and the defendant but not the dissolution of the partnership;

(c) Based on the evidence on record, the plaintiff failed to adduce sufficient evidence to prove that the parties had entered into the said agreement upon or in anticipation of the dissolution of the partnership practice; and

(d) Since the first issue was decided in the negative, the plaintiff is not entitled to damages.

A

The Appeal

[8] The sole ground raised by the plaintiff in assailing the decision of the learned trial judge is that His Lordship erred in law and fact in holding that exception 2 of s. 28 of the Contracts Act 1950 does not apply to this instant appeal.

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[9] Learned counsel for the plaintiff submitted that this instant appeal falls under exception 2 of s. 28 of the Contracts Act 1950. Learned counsel posited that the parties have anticipated dissolution of the partnership. Learned counsel invited the court's attention to the following evidence and facts:

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(a) Dr Yap Cheng Kwee (PW1) who has signed the said agreement (P3) told the court that when cl. 11(iii) was inserted in the said agreement, there was a common understanding between the parties that upon admission of the defendant as a new partner of the plaintiff and upon ceasing to be a partner, he should not set up any form of practice as a medical practitioner by himself or as a partner or employee of any person or company within 15km radius form any branches of the appellant for three years after ceasing to be a partner.

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(b) Clause 2 (ii) of the said agreement (P3) states:

E

> The working partnership shall be extended on a yearly basis from the date of expiry. Either the managing partner or Dr Nagadevan may terminate the partnership by giving three (3) months notice in advance to the other. If no notice of termination was given by either of them three (3) months prior to the expiry of the partnership then in such event the parties have agreed or deemed to have agreed to continue the partnership on a yearly basis period from the date of expiry subject to the same terms and conditions.

F

(c) The defendant told the court that he agrees when a partnership is formed, the inevitable consequence in years to come is either the partnership subsists or the partnership dissolves. He also agrees that naturally this is within the contemplation of all partners when a partnership is formed. He further agrees that when a partner entered into a partnership or signed a partnership agreement, he would have anticipated that the partnership would continue or the partnership would dissolve in the future.

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[10] It was the contention of learned counsel for the plaintiff that the moment the defendant executed the said agreement, he has become a partner of the firm (the plaintiff) and the said agreement is binding on him. It makes no sense to say that the defendant was not yet a partner of the firm when he executed the said agreement. Learned counsel posited that this is further strengthening by cl. 2(1) of the said agreement:

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> The new partnership shall be deemed to have commenced on the 1st day of November, 2006 and shall continue for a term of two (2) years from that date. At the end of the said two (2) year term, the partnership shall continue on yearly basis.

[11] Further, it was contended that it is not necessary that the whole partnership must be dissolved in order to invoke the exception 2 of s. 28 of the Contracts Act, 1950. It is sufficient if an agreement is made in anticipation of a dissolution of partnership, involving a single or several of the partners, which may or may not happened.

[12] The limit of 15km radius from the plaintiff's branches is reasonable.

[13] In support of his submission, reliance was placed on the Privy Council's decision in *Deacon's (a firm) v. Bridge* [1984] 2 All ER 19 where the Privy Council applied the "reasonable test" and upheld the injunction and ruled that a restrictive covenant which states that if a partner ceased to be a partner, he is not to act as a solicitor in Hong Kong for a period of five years was reasonable.

[14] Learned counsel submitted that in this instance appeal, the territory limit is only 15km radius from the plaintiff's branches and the duration is only for three years. This clearly shows that the limit imposed by cl. 11(iii) is reasonable.

Our Findings

[15] We will begin by discussing exception 2 to s. 28 of the Contracts Act 1950 which reads:

> 28. Every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void.
>
> ...
>
> of agreement between partners prior to dissolution Exception 2 - Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in exception 1.

[16] The Delhi High Court in *Wipro Ltd v. Beckman Coulter International SA*, 2006 (3) ARBLR 118 (Delhi) summarised the principles of s. 27 of the Indian Contracts Act (which is in *pari materia* with our s. 28 of the Contracts Act 1950) as follows:

> (1) Negative covenants tied up with positive covenants during the subsistence of a contact be it of employment, partnership, commerce, agency or the like, would not normally be regarded as being in restraint of trade, business of profession unless the same are unconscionable or wholly one-sided;
>
> (2) Negative covenants between employer and employee contracts pertaining to the period post termination and restricting an employee' s right to seek employment and/or to do business in the

same field as the employer would be in restraint of trade and, therefore, a stipulation to this effect in the contract would be void. In other words, no employee can be confronted with the situation where he has to either work for the present employer or be forced to idleness;

(3) While construing a restrictive or negative covenant and for determining whether such covenant is in restraint of trade, business or profession or not, the courts take a stricter view in employer-employee contracts than in other contracts, such as partnership contracts, collaboration contracts, franchise contracts, agency/distributorship contracts, commercial contracts. The reason being that in the latter kind of contracts, the parties are expected to have dealt with each other on more or less an equal footing, whereas in employer-employee contracts, the norm is that the employer has an advantage over the employee and it is quite often the case that employees have to sign standard form contracts or not be employed at all;

(4) The question of reasonableness as also the question of whether the restraint is partial or complete is not required to be considered at all whenever an issue arises as to whether a particular term of a contract is or is not in restraint of trade, business or profession.

[17] In *Nagadevan Mahalingam v. Millennium Medicare Services* [2011] 3 CLJ 529; [2011] 4 MLJ 739, this court had elaborated on the purport and effect of s. 28 as follows:

[11] **The said s. 28 clearly provides that a contract in restraint of trade is void unless it falls under any of the exceptions thereto**. It is apparent to us that the said provision is a statutory codification of the common law principle on this subject. However, **we shared the view expressed by Visu Sinnadurai J in Polygram Records Sdn Bhd, that the validity of such covenant is not subject to the 'reasonableness test' under the common law**. On this issue we also find support in the opinion expressed by Hashim J in *Wriggleworth*'s case, to the effect that the English cases were not applicable in the interpretation of the said section. Further, in our view, the inclusion of the three common law exceptions to the general rule on the covenant in restraint of trade as provided in that section is a clear manifestation of the intention of the legislature to make the said provisions exhaustive.

[12] We will proceed with the first issue. In *Petrofina (Gt Britain) Limited v. Martin And Another* [1966] 1 All ER 126, Lord Diplock said, at p 138: 'A contract in restraint of trade is one which a party (the covenantor) agrees with any other party (the covenantee) to restrict the liberty in the future to carry on trade with other persons not parties to the contract in such manner as he chooses …' In the instant case it is apparent to us that the covenant in said cl. 11(iii) has the effect of restricting the liberty of the appellant to carry on the practice of medical practitioner in future either by himself or with other persons for such period and within such limit as specified therein. We therefore conclude that it is an agreement in restraint of trade within the meaning of s. 28 of the Act.

[13] There remains the question as to whether such an agreement was made in anticipation of the dissolution of the partnership so as to fall within the ambit of the said exception 2. In our view it was not so made. It is apparent from the wordings thereof that the said exception only apply to an agreement made between partners, and that the same was made upon or in anticipation of the dissolution of the partnership. In the present case it is without doubt that the appellant was not even a partner of the firm at the time of the execution of the agreement. It is evident from cl. 1 thereof, that he was only admitted as a partner of the firm pursuant to the agreement. Since the appellant was not even a partner of the firm then, it cannot be said that the said agreement was made in anticipation of the dissolution thereof. Further, it was not even pleaded in the statement of claim that the restrictive covenant sought to be enforced herein was made with such an objective.

[14] For the reasons aforesaid, we hold that the clause sought to be enforced herein was a covenant in restraint of trade, and therefore void under s. 28 of the Act ... . (emphasis added).

[18] In *Vision Cast Sdn Bhd & Anor v. Dynacast (Melaka) Sdn Bhd & Ors* [2014] 8 CLJ 884, this Court had this to say:

49. The only contrary position as regards the effect of s. 28 on agreements restraining one from being engaged in similar trade after resignation (termination) appeared to be that expressed by Abdul Malik J in the High Court case of *Worldwide Rota Dies Sdn Bhd v. Ronald Ong Cheow Joon* [2010] 1 LNS 444; [2010] 8 MLJ 297. His Lordship there in that case while acknowledging the strict terms of s. 28 and the need for legislative intervention to change its rigours, yet opted to apply the common law regime (of reasonable restraint) to the issue of restraint of trade.

The learned author of Visu Sinnadurai, *Law of Contract* (4th Edition) (Lexis Nexis, 2011) (at page 738) opines that this decision was clearly wrong in importing a test of reasonableness to determine the validity of a clause in restraint of trade.

[19] It is clear, therefore, the concept of reasonableness and fairness will not be applicable to agreements in restraint of trade in Malaysia as compared to the United Kingdom. Section 28 of the Contracts Act 1950 is general in its terms and unequivocally declares all agreements in restraint of trade void *pro tanto*, except in the cases specified in the exceptions. This section lays down a very rigid rule invalidating restraints, not only general restraints but also partial ones, and also restricts the exception to narrow limits.

[20] It is pertinent to note that s. 28 of the Contracts Act 1950 was enacted at a time when trade was undeveloped and the object underlying the section was to protect the trade from restraints. The Law Commission of India recommended that s. 27 of the Indian Contracts Act (which is in *pari materia* with our s. 28 of the Contracts Act 1950) be amended to permit reasonable restraint on the right to carry on trade. The Supreme Court of India in *Percept D'Mark (India) Pvt Ltd v. Zaheer Khan & Anor AIR* [2006] SCC 227 observed as follows:

A ... somewhere there must be a line between those contracts which are in restraint of trade and whose reasonableness can, therefore, be considered by the Courts which merely regulated the normal commercial relations between the parties and are, therefore, free from doctrine ... .

[21] Having said that, we must issue a caveat here. Until such time as it is B otherwise provided (including any amendment to the section by Parliament), the court must give effect to the existing s. 28.

[22] We now turn our focus to the contentious issues in this instant appeal.

[23] At the outset, it must be noted that the learned trial judge ruled that C the plaintiff had failed to plead the facts to support its claim that the said agreement was entered into in anticipation of the partnership practice being dissolved.

[24] We agree with the findings of the learned trial judge. In the defendant's statement of defence, it is expressly pleaded in para. 5 that:

D 5. Mengenai perenggan 4 Pernyataan Tuntutan Plaintiff, Defendan menegaskan bahawa Klausa 11(3) Perjanjian tersebut adalah tidak sah dan tidak boleh dikuat kuasakan kerana ia adalah bercanggah dengan peruntukan di bawah seksyen 28 Akta Kontrak 1950.

[25] In its reply to defence, the plaintiff once again failed to plead the facts E to support its claim that the said agreement was entered into in anticipation of the partnership practice being dissolved.

[26] It is trite that parties are bound by their pleadings and the court is precluded from deciding on a matter that the parties themselves have decided not to put into issues. As Sharma J said in *Janagi v. Ong Boon Kiat* [1971] F 1 LNS 42; [1971] 2 MLJ 196 at [21]:

The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a G disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance ...

[27] In our view, the issue whether the said agreement was made upon or H in anticipation of the dissolution of partnership is a question of fact which must be pleaded. The plaintiff had ample opportunity to include in its pleading the material facts and circumstances which support its claim that said agreement was entered into in anticipation of the partnership practice being dissolved but nevertheless failed to do so.

I **[28]** Concerning the issue whether the plaintiff had succeeded in discharging its burden of proof, the learned trial judge held that based on the evidence adduced at the trial, the plaintiff had failed on the balance of

probabilities to prove its assertion that the said agreement was entered into in anticipation of the partnership practice being dissolved, and therefore, exception 2 to s. 28 of the Contracts Act 1950 clearly did not apply to this instant appeal.

[29] We have carefully scrutinised the evidence on record and we have come to the same conclusion arrived at by the learned trial judge. In our opinion, the conclusion of the learned trial judge was amply supported by the evidence and did not suffer from any infirmity warranting intervention from this court. The learned trial judge relied mainly on the following evidence to come to the conclusion as he did:

(i) The purpose of the partnership agreement was to admit the defendant as a working partner of the partnership practice;

(ii) There was no discussion between the plaintiff and the defendant of any possibility of the partnership being dissolved in the near future;

(iii) The said agreement does not contain a specific clause which deals with the dissolution of the partnership practice; and

(iv) Clause 2(ii) of the said agreement only governs the termination of the partnership agreement between the plaintiff and the defendant but not the dissolution of the partnership.

[30] The learned trial judge was correct in holding that there was not an iota of evidence to show that the partnership agreement was made in anticipation of the dissolution of the partnership practice then or in the near future. Neither was any such inference could be drawn from the facts adduced that the parties expected that the dissolution of the partnership would probably happen and they had prepared for it at the time of the execution of the partnership agreement.

[31] It is trite law that an appellate court will not ordinarily disturb or interfere with the findings of facts of the court below unless such findings are plainly wrong or there had been insufficient judicial appreciation of the evidence before it. (See *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163 (FC), *Eng Thye Plantation Bhd v. Lim Heng Hock & Ors* [2001] 4 CLJ 245 (CA) and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 (FC). In order to reverse the finding of facts, we must not merely entertain doubt whether his decision was right, but be convinced that it was wrong.

[32] The plaintiff failed to persuade us that the trial judge's findings of facts were plainly wrong or without evidence to support them.

[33] We are fortified in our decision by the fact that said agreement does not contain a specific clause which deals with the dissolution of the partnership practice. On the contrary, it contains a clause on the continuance of the partnership practice which expressly provided that:

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26. Continuance Of Partnership

When a partner ceases to be partner for any reason, then, unless the remaining partners otherwise decide, the partnership shall not be determined as between the continuing partners and they shall continue in partnership upon the terms of this agreement or such other terms as may be agreed upon by the continuing partners.

B

[34] Further, it is also expressly provided in the said agreement that the partnership practice shall continue even in the absence of the managing partners. This can be gleaned from cl. 22(a) which provides that:

C

22. In Capacity Of Managing Partner

(a) In the even that the managing partner is unable to perform his duties as partner for any reason whatsoever or becomes incapacitated during the currency of this partnership or unable to obtain the necessary licence to continue with the medical practice, then in such event, Dr Nagadevan (or his deputy doctor, to be appointed in his absence) will be fully responsible to manage all clinics and to obtain or cause to obtained the necessary licence or licences or approval from the relevant authorities to continue the medical practices at the four clinics belonging to the partnership.

D

Conclusion

E

[35] For the foregoing reasons, we unanimously find the appeal is bereft of merit and the same is dismissed with costs to the defendant in the sum of RM10,000 and the deposit to be remitted to the defendant to account of costs.

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